

STATE OF MINNESOTA
OFFICE OF HEARING EXAMINERS
FOR THE MINNESOTA ENERGY AGENCY

in the matter of the Application of Northern
States Power Company for a Certificate of
Need to Increase the Storage Capacity of
the Spent Fuel Pool at the Prairie Island
Nuclear Electric Generating Facility.

ORDER ON MOTIONS TO
CERTIFY CERTAIN MATTERS
TO THE DIRECTOR

1. Introduction

On April 24, 1980, the Examiner issued his order on Motion to Exclude
Tes-

timony wherein he excluded some of the prefiled testimony of PIP
witnesses

pursuant to a Motion filed by NSP.

By letter dated May 2, 1980, NSP requested that a small portion of
the

April 24th Order be certified to the director. Specifically, NSP
requested

that the ruling to admit testimony relating to the consequences of
Class 9

accidents be certified.

By letter dated May 7, 1980, PIP also requested certification with
regard

to certain excluded testimony of Charles W. Huver.

Minn. Rule 9 MCAR 2.217 F. contains standards to guide the
Examiner in

ruling on the requests for certification. That rule provides, in part,
that

in deciding what motions should be certified, the Examiner shall consider
tie

following:

1. Whether the Motion involves a controlling question of

law as to which there is substantial ground for a difference of opinion; or

2. Whether a final determination by the Agency on the Motion would materially advance the ultimate termination of the hearing; or

3. Whether or not the delay between the ruling and the Motion to Certify would adversely affect the prevailing party; or

4. Whether to wait until after the hearing would render the matter moot and impossible for the Agency to reverse or for a reversal to have any meaning; or

5. Whether it is necessary to promote the development of the full record and avoid remanding.

II. Class 9 Issue

The starting point for an understanding of the Class 9 matter is set forth in the April 24th Order at the bottom of the first page and the top two-thirds of the second page. That material will not be repeated here.

NSP argues, in its May 2nd letter, that the Examiner's ruling to admit testimony relating to the consequences of Class 9 accidents:

. . . appears to be based upon an interpretation of the Director's order with which we differ. Specifically, we did not believe that the Director took any position on Class 9 accidents or that he intended to forbid exclusion of extremely remote or speculative matters.

The primary question to be answered by the Examiner is whether or not the motion to Certify should be granted.

Based upon the factors set forth in the above-quoted rule, particularly paragraphs 2 and 5, the Examiner believes it is appropriate to grant the Motion to Certify. It is particularly appropriate to grant such a motion under the facts of this case because of the already existing delay in resuming the hearings and the substantial amount of time which the Examiner believes would be expended in receiving evidence regarding the Class 9 issue.

A secondary question before the Examiner is whether or not to make any recommendation on this question, and if so, what recommendation should be made.

At the time that the Third Prehearing Order was issued, the Examiner did not have PIP's prefiled testimony. At the time that he decided to deny NSP'S Motion to Exclude the Testimony, it was available. The most important difference between the two situations is that the prefiled testimony of Richard E.

Webb contains a scenario whereby a Class 9 accident in a reactor is alleged to impact upon the ability of maintenance personnel to routinely service the water circulation pumps and other machinery in 2 spent fuel pool. This scenario is most concisely set forth in Webb's response to the question set forth on page 3 of his prefiled testimony.

on the other hand, the Director must weigh the time and expense which would be incurred if the testimony were to be allowed. While it is impossible to quantify these at this time, the Examiner believes that they could be substantial.

On balance, the Examiner recommends that the testimony be admitted.

III. Huver Testimony

PIP has also requested certification with regard to the testimony of Charles W. Huver. Basically, PIP seeks to have Huver's testimony treated in the same way that the testimony of Dr. Ernest Sternglass was treated in the April 24th Order.

In the April 24th Order, the Examiner ruled that the bulk of the Sternglass testimony was inadmissible because there was an insufficient linkage between the testimony and NSP's plan to increase the amount of spent fuel to

be stated at Prairie Island. However, the Examiner stated that he would allow PIP to attempt to make a more thorough attempt at showing the linkage. If an adequate linkage was established, then he would reconsider allowing portions of the stricken testimony -Lo be reinstated, depending upon whether or not a credible linkage was shown between NSP's proposed plan and the particular piece of testimony at issue. PIP has now requested similar treatment for the testimony of Dr. Huver which was excluded in the April 24th Order.

For the same reasons which applied in the case of the Class 9 testimony, the Examiner believes it is appropriate to grant the request for certification.

A recommendation, however, is more difficult in this situation. Huver's

testimony can essentially be divided into five portions: An Introduction, a Discussion of Tritium, a Discussion of Noble Gases, a Discussion of Carbon-14, and a Conclusion.

With regard to the Introduction (Question 4), the Examiner recommends that the testimony not be admitted for the reasons given in the third full paragraph on page 10 of the April 24th Order. With regard to Tritium (Question

5). PIP is not asking for certification of this portion of the April 24th Order. With regard to noble gases (Question 6), and Carbon-14 (Question 7), PIP is requesting that it be allowed to make an additional showing of linkage before the Admissibility of the testimony is finally Determined.

Any, recommendation with regard to this request must be understood as a reflection of a basic policy position with regard to prefiled testimony. There are at least two policy positions which can be taken. The first is that if a witness fails to establish a crucial point in prefiled testimony, and an objection is made, then the testimony must be excluded. The second is that if a witness fails to establish a crucial point in prefiled testimony, and an objection is made, then the witness ought to be allowed to "cure" the defect before any final decision is made.

The Examiner initially distinguished the Sternglass and Huver testimony on the basis that Sternglass had made enough of a linkage to raise a reasonable doubt in the mind of the Examiner with regard to whether or not the linkage did, in fact, exist. Huver, on the other hand, had failed to make virtually any linkage. The Examiner's decisions in the Third Prehearing Order essentially reflect his own policy. However, the Examiner believes that the Director ought to be given the opportunity to state his own policy, in the context of this case, as he is the one who must make the ultimate decision in this case.

The Examiner makes no recommendation with regard to these two questions.

The final portion of Huver's testimony is a summary (Question 8). Really, the question and answer are not crucial in this case because the Examiner (and ultimately, the Director) will reach their own conclusions based upon specific facts which will be brought forward at the hearing. An expert may testify on an ultimate issue to be decided by the trier of fact (Minnesota Rule of Evidence 704), but in this particular case, the conclusions of the Examiner and the Director will be their own based on the record as a whole.

The Examiner has no recommendation with regard to the first half of Question 8 of Huver's testimony. With regard to the second half, however, the Examiner recommends

that it be stricken for the reasons set forth in the April 24th order.

IV. Summary and Order

Based on the foregoing, the Examiner hereby makes the following:

ORDER

1. That NSP's request to certify to the Director that portion of the Examiner's Order on Motion to Exclude Testimony relating to Class 9 incidents is GRANTED.

2. That PIP's request to certify to the Director that portion of the Examiner's Order on Motion to Exclude Testimony relating to certain testimony of Charles W. Huver is GRANTED.

3. That the Examiner's recommendations to the Director (to the extent that he chooses to make recommendations) are as set forth above.
Dated this 8th day of May, 1980.

ALLAN W. KLEIN
Hearing Examiner